Franchet Metal Craft, Inc. *and* Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL-CIO. Cases 29-CA-8405 and 29-CA-8520

June 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Franchet Metal Craft, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has filed a motion to reopen the record for the purpose of admitting testimony to show that prior to the election Respondent expressed its intent to discharge Griffiths, Evans, and Tillman to the Board agent handling the representation petition. The motion is hereby denied inasmuch as the asserted evidence is not newly discovered.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On October 23, 1980, Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL-CIO (herein called the Union), filed the unfair labor practice charge in Case 29-CA-8405 against Franchet Metal Craft, Inc. (herein called Respondent). On December 22, 1980, the Union filed the unfair labor practice charge in Case 29-CA-8520 against Respondent. Complaints were issued in Cases 29-CA-8405 and 29-CA-8520 on December 22, 1980, and on January 28, 1981, respectively, by an order issued on April 2, 1981, these two cases were consolidated for hearing. Respondent filed timely answers to both complaints. The hearing in the consolidated cases took place before me in Brooklyn, New York, on July 20, 1981. The issues raised by the pleadings are as follows:

(a) Whether Respondent, by its president, Frank Musacchia, promised medical benefits and wage increases to its employees, informed them that Respondent does not want a union in its shop, and threatened to close its plant if the Union came in and thereby violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

(b) Whether Respondent discharged its employees Aubrey Griffiths, Donovan Evans, and Wyndhan Tillman because of their membership in and activities on behalf of the Union, and thereby violated Section 8(a)(1) and (3) of the Act.

(c) Whether Respondent refused to respond to the request by the Union to bargain collectively after the Union had been certified as the collective-bargaining representative of Respondent's employees and thereby violated Section 8(a)(1) and (5) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The pleadings establish and I thus find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures metal sleeves and related products which are used in the installation of air-conditioning units in large buildings. Its plant, referred to herein as the Jamaica plant, is located in the borough of Queens in the State of New York. Until the fall of 1980, as discussed below, Respondent's production and maintenance employees at its Jamaica plant were unrepresented.

B. *The Alleged Promises, Threats, Discriminatory Discharges, Refusals To Bargain, and Related Events*

Joseph Parisi, a business agent for the Union, testified for the General Counsel that, on August 8, 1980 (all dates hereafter are for 1980 unless otherwise indicated), he obtained signed union authorization cards from four of Respondent's six production and maintenance employ-

ees. On that date, he asked Respondent's president, Frank Musacchia, for recognition on behalf of the Union after advising him that he had obtained signed authorization cards from a majority of the unit employees. Parisi testified that Musacchia refused his request. Aubrey Griffiths, Donovan Evans, and Wyndhan Tillman also testified for the General Counsel that they had signed authorization cards in August which were given to them by Parisi.

On September 2, the Union filed a petition in Case 29-RC-5132 seeking an election among Respondent's production and maintenance employees. Pursuant to an Agreement for Consent Election, the date of October 16 was set for the conduct of the election in that case.

Aubrey Griffiths testified that he has been employed by Respondent for 3 years principally as a spray painter. He testified that on October 15 (the day before the scheduled election) Respondent's president, Frank Musacchia, had stated that "you guys need some hospital benefits." Griffiths testified that he then told Musacchia that he could not afford those benefits and that Musacchia then told him not to worry about it as he, Musacchia, will pay for it by giving Griffiths another raise in pay in January (1981) to cover the additional costs. Griffiths further recounted that Musacchia stated that "he will leave it to you guys" after noting that "tomorrow is the election." Griffiths concluded his testimony in this area by stating that Musacchia then advised that he did not want any union to come into the shop and that, if a union did come in, he would close the shop. Later that day, Musacchia "had" his cousin speak to the employees. They were asked to furnish age, marital data, and other information of the type related to medical insurance for an employee and members of his family.

Musacchia testified at some length during the hearing, as noted below, but he did not in the course of his testimony deny any of Griffiths' testimony respecting statements made by him on October 15 and he did not make reference to those statements. In view of the uncontroverted nature of Griffiths' testimony and as he impressed me as candid, I credit his testimony.

The election among the unit employees was held just before noon on October 16. The tally of ballots, which issued upon the conclusion of the election, indicated that all six eligible employees voted for the Union. Musacchia signed the tally of ballots on behalf of Respondent. The Union's representative then asked to negotiate and Musacchia told him that there would be no negotiations.

At the conclusion of work that day, i.e.—4:30 p.m., employees Griffiths, Evans, and Tillman changed into their street clothes and approached the timeclock in order to punch out. They testified that their timecards were not in the rack and that Musacchia called to them and handed each of them an envelope containing their checks for the wages earned that week, October 13 through 16. (They had, on October 15, received their paychecks for the week ending October 12.) Griffiths testified that, when Musacchia handed him his paycheck on October 16, Musacchia told him that he was being given his "4 days pay" and that his services were no longer needed. Griffiths asked if he might take his work clothes with him and Musacchia told him that he should. Evans testified that Musacchia told him that, since the Union put him in the category of a packer, his services were no longer needed. Tillman testified that Musacchia simply told him that there was no more work.

The Union's representative, Parisi, testified that he telephoned Musacchia later that week and was told by Respondent's secretary that Musacchia was not in. Parisi tried on several occasions thereafter to reach Musacchia at the shop but had no success. On October 27, Parisi sent a mailgram to Musacchia requesting bargaining and received no reply. Two days after having sent the mailgram, Parisi saw Musacchia in front of the Jamaica plant, according to Parisi's testimony, and he asked Musacchia if Respondent was ready to make an appointment to negotiate a contract. Parisi quoted Musacchia as saying then, "[G]o and scratch your ass." Parisi testified that he has made repeated efforts to contact Musacchia since then to arrange a date to negotiate a contract but that he has been rebuffed each time. Musacchia testified at the hearing but did not controvert any of Parisi's accounts and, for that matter, did not refer to them at all in the course of his testimony. I credit Parisi's account in full.

The Union was issued a Certification of Representative in Case 29-RC-5132 on October 29 as the exclusive representative of all full-time and regular part-time production and maintenance employees employed by Respondent at its Jamaica plant excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

C. *The Reasons Given by Respondent for Discharging Griffiths, Evans, and Tillman*

Musacchia testified that Griffith was discharged because (a) on one occasion he refused to perform assigned work, (b) he left work one day, apparently without authorization, (c) he took 8 hours on October 16 to perform a job which should have been done in 1 hour at most, and (d) there was no spray painting work to be done, the work Griffith was then doing. It is uncontroverted that Griffith had never been warned as to his work performance or attendance, that he regularly performed work other than spray painting, that spray painting is an essential part of Respondent's operations, that in the past Respondent had always found work in slow periods in order to keep its employees working, and that Griffiths had received a wage increase in the preceding month. Musacchia's testimony did not accord with that of his foreman, Leo Trince, as to the incident in which Griffiths allegedly refused to work on a job. I credit Griffiths' denial respecting such an alleged incident. In view of the shifting and unsupported reasons given by Respondent, as the evidence is uncontroverted that Musacchia had, on October 15, promised him another wage increase for January 1981 and as Respondent had never warned Griffiths as to any asserted deficiencies in his work performance, I find that the reasons given by Respondent for his discharge on October 16 were clear pretexts. (Griffiths was recalled to work by Respondent and, in response to a question, informed Respondent that he would work on any job assigned to him.)

Respondent contends that it discharged Wyndhan Tillman on October 16 because he was "a danger to the shop" and because he was absent too often.

Respondent's president, Musacchia, testified that Tillman had been absent from work about once a week since at least late June 1980 and that he often came to work in a drunken condition. Respondent's foreman, Leo Trince, testified that there were times when he could not assign Tillman to work because "he would have a little taste of liquor in him."

Tillman began work for Respondent in March 1980 as a machine operator and was paid at minimum wage. He testified that there had always been some drinking in the shop and that Respondent's foreman, Trince, took part in it. Tillman testified that he was never warned that he might be discharged. That testimony was not controverted.

While the evidence indicates that Tillman had a poor attendance record and sometimes drank at work, the evidence is also clear that at no time did Respondent express any concern with these matters until after the unit employees had selected the Union unanimously on October 16. I conclude that the reasons offered by Respondent for Tillman's discharge were clearly pretexts.

Respecting the third alleged discriminatee, Donovan Evans, Respondent contends that it discharged him because he worked as a packer and as there was no packing work to be done. The uncontradicted evidence, however, indicates that Respondent has continued in business, has hired new employees since October 16, and had made no effort to assign Evans to other work, although Evans had done work other than packing. Evans testified without contradiction that Musacchia told him on October 16 that he was being laid off because the Union put him, Evans, in the category of a packer and on that basis his services were no longer needed. Respondent's foreman, Leo Trince, confirmed Evans' testimony that Evans had worked on notching and other work whenever there was not enough work to keep him, Evans, busy as a packer. I find that the reason offered for Evans' termination by Respondent was an afterthought and a clear pretext.

D. *Analysis*

The uncontroverted evidence establishes that Respondent's president, Musacchia, promised its employees on October 15 that they would be covered by medical insurance, promised employee Griffiths a wage increase, and threatened to close its plant if a union came in after having stated that Respondent did not want a union there. I find that these statements interfered with, coerced, and restrained employees with respect to their rights under Section 7 of the Act.[1]

The uncontroverted evidence also establishes that the Union was the certified bargaining representative of Respondent's production and maintenance employees at its Jamaica plant and that Respondent had either ignored or rejected outright all efforts by the Union to have Respondent meet with the Union to negotiate a collective-bargaining agreement for the unit employees. In that regard the testimony of the Union's representative, Parisi, indicates that on and after the date the Union was certified as the exclusive bargaining representative, October 29, Respondent has not made any attempt to honor the requests to bargain. I thus find that Respondent has since at least October 29, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of all full-time and regular part-time production and maintenance employees employed by Respondent at its Jamaica plant excluding all office clerical employes, professional employees, guards and supervisors as defined in the Act.[2]

Respecting the allegation that Respondent discriminatorily discharged its employees, Aubrey Griffiths, Donovan Evans, and Wyndhan Tillman, on October 16, the evidence establishes that they had signed authorization cards for the Union on August 8, that notwithstanding the promises and threats made by Respondent's president on October 15 they voted for the Union in the election held about noon on October 16, and that they were summarily discharged later on October 16. I have found separately, as noted above, that the reasons given by Respondent for their discharges were clearly pretextual. In view of (a) the fact that Griffiths, Evans, and Tillman participated in a unanimous vote for the Union on October 16, (b) Respondent's threat and related conduct on October 15 that it would do whatever it needed to in order to insure that it would not have a union to deal with, (c) the sudden, unexpected nature of the discharges on the day after payday, and (d) the clearly pretextual nature of the reasons given by Respondent for the discharges, I find that Respondent discharged Griffiths, Evans, and Tillman on October 16 because of their support for the Union and that Respondent thereby discharged its employees for joining or supporting the Union.[3]

Upon the foregoing findings of fact and upon the entire record in this case considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Franchet Metal Craft, Inc., is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees employed by Respondent at its Jamaica plant excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 29, 1980, the Union has been the exclusive representative of all the employees in the unit

[1] *Dooley Equipment Corporation*, 252 NLRB 88 (1980).

[2] *Space Building Corp.*, 254 NLRB 962 (1981).

[3] *Flite Chief, Inc., et al.*, 229 NLRB 968 (1977).

found appropriate above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By having promised medical insurance coverage and wage increases, and by informing employees that Respondent did not want the Union while at the same time threatening to close its Jamaica plant if a union came in, Respondent has violated Section 8(a)(1) of the Act.

6. By having discharged on October 16 its employees Aubrey Griffiths, Donovan Evans, and Wyndhan Tillman, by having failed to reinstate Aubrey Griffiths to employment until January 1981, and by having failed to reinstate Donovan Evans and Wyndhan Tillman to its employment since October 16 because of their membership in and support for the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit as found appropriate in conclusions of law, paragraph 3 above, Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The foregoing unfair labor practices have a close, intimate, and adverse affect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent herein has engaged in unfair labor practices, I will recommend that it will be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. While Respondent's unfair labor practices perhaps cannot be characterized as widespread, they were certainly numerous and egregious and I therefore conclude that Respondent has demonstrated a deliberate disregard of the Section 7 rights of its employees. On that premise, a broad remedial order is warranted in this case.[4]

Having found that Respondent in violation of Section 8(a)(5) has failed to bargain collectively with the Union on and since the date the Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees and in order to insure that those employees are accorded the services of their selected bargaining agent for the period provided by law, I shall order Respondent to bargain collectively with the Union for at least 1 year beginning on the day Respondent has commenced to bargain in good faith with the Union.[5]

The recommended Order will also provide that Respondent be required to offer Evans and Tillman immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions of employment and to make them whole, along with Aubrey Griffiths (from the date of his discharge on October 16, 1980, until his return to employment in January 1981), for any loss of earnings which they may have sustained by reason of the discrimination practiced against them, in accordance with the formula set out in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest at the rate provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977), and in accordance with the holding in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

I shall also recommend that Respondent be required to post the usual notice advising employees of their rights and of the results of this case.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[6]

The Respondent, Franchet Metal Craft, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promising its employees medical insurance coverage and wage increases to discourage them from supporting Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL–CIO.

(b) Threatening to close its Jamaica plant to discourage its employees from supporting the Union.

(c) Discouraging its employees from joining or taking part in activities on behalf of the Union by discharging any of its employees.

(d) Refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees employed by Respondent at its Jamaica plant excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(e) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer to Donovan Evans and Wyndhan Tillman immediate and full reinstatement to their former positions of employment or to substantially equivalent positions if their former positions no longer exist, without prejudice to their seniority or other rights previously enjoyed, and make them and Aubrey Griffiths whole for any losses or benefits suffered by them by reason of the discrimination found herein, in the manner described above in the section entitled "The Remedy."

(b) Recognize and, upon request, bargain collectively with Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL–CIO, as the exclusive bargaining representative of all full-time and regular part-time produc-

[4] *Clark Manor Nursing Home Corp.*, 254 NLRB 455 (1981); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[5] *Carbonex Coal Company*, 248 NLRB 779, 781 (1980).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tion and maintenance employees employed by Respondent at its Jamaica plant excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Respondent's place of business in New York City, New York, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT promise medical insurance or wage increases to our employees to induce them not to support Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL-CIO.

WE WILL NOT threaten to close our plant to induce our employees to abandon their support for that Union.

WE WILL NOT discharge any employees to discourage support for that Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under the National Labor Relations Act, as amended.

WE WILL offer to Donovan Evans and Wyndhan Tillman full and immediate reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent employment, without prejudice to their seniority or to other rights to which they are entitled and WE WILL make them and Aubrey Griffiths whole for any loss of pay or benefits suffered by them by reason of our having discharged them on October 16, 1980.

WE WILL recognize and, upon request, bargain collectively with Production Service and Allied Workers Union Local 143, Office and Professional Employees International Union, AFL-CIO, as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees employed by us in our Jamaica plant excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

FRANCHET METAL CRAFT, INC.